

IN UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MASSACHUSETTS

DOUGLAS S. BROWN, STEPHEN KAWELTI  
and JAMES A. PROSSER,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No. 05-10713-PBS  
Hon. Patti. B. Saris

Complaint Filed: April 11, 2005

**DEFENDANT, BANK OF AMERICA N.A.'S STATEMENT OF MATERIAL  
FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. Proc. 56(c) and Local Rule 56.1, Defendant, Bank of America N.A., submits the following Statement of Undisputed Material Facts As To Which There Is No Genuine Dispute Issue To Be Tried, with references to supporting evidence, in support of its Motion for Partial Summary Judgment.

**I. PARTIAL SUMMARY JUDGMENT ON COUNT I -- DID BANK OF AMERICA'S USE OF THE VERB "MAY" ON ITS ATM DECALS IN CALIFORNIA AND MARYLAND VIOLATE THE ELECTRONIC FUNDS TRANSFER ACT, 15 U.S.C. §§1693 *ET SEQ.***

**Material Fact**

**Supporting Evidence**

- |  |   |
|--|---|
| <p>1. Plaintiffs contend on behalf of the putative Maryland and California classes that Bank of America's ATM Decals in Maryland and California violate the Electronic Funds Transfer Act (15 U.S.C. §§1693 <i>et seq.</i>) by stating that fees "may" be charged.</p> | <p>1. Plaintiffs' Second Amended Complaint ("SAC") ¶18.</p> |
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**Material Fact**

2. The decal that Bank of America affixes to its ATM machines in Maryland and California states:

“The owner of this terminal, Bank of America, may charge a \$1.50 fee for a cash withdrawal from your NON-Bank of America account. This charge is in addition to any fees that may be assessed by your financial institution. This additional charge will be added to your total withdrawal amount. For questions, please contact your financial institution.”
3. Bank of America does not charge ATM fees to recipients of government benefits that receive their government payments through a stored-value card when that card is used to withdraw cash at a Bank of America ATM.
4. Bank of America does not charge a fee for cash withdrawals at its ATMs in Maryland and California for the following categories:
  - (a) its own customers;
  - (b) international transactions, *i.e.*, cash withdrawals made in the U.S. by cardholders who hold an ATM card issued by a foreign bank;
  - (c) customers of certain other financial institutions (Bank of the Commonwealth, Velero Credit Union, Fleet Bank, Bristol County Savings Bank, Mechanics Savings Bank, and some MBNA cardholders; and
  - (d) special circumstances arise, such as Hurricane Katrina, after which Bank of America agreed not to charge for cash withdrawals made by cardholders using certain ATM cards issued by certain financial institutions located in Alabama, Louisiana, and Mississippi.

**Supporting Evidence**

2. Declaration of Jennifer Haag in Support of Bank of America’s Motion for Partial Summary Judgment. (*See* Decl. ¶4, Exhibit A.)
3. SAC ¶18.
4. Declaration of Jennifer Haag ¶7.

**II. PARTIAL SUMMARY JUDGMENT ON BANK OF AMERICA'S TENTH AFFIRMATIVE DEFENSE -- ARE PLAINTIFFS' STATUTORY DAMAGES CAPPED AT \$500,000?**

**Material Fact**

**Supporting Evidence**

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|---|---|
| <p>1. Bank of America asserts as a Tenth Affirmative Defense:</p> <p style="padding-left: 40px;">“To the extent that members of the putative classes suffered injury or damage, which Defendant denies, such injury or damage is capped at \$500,000.”</p> <p>2. Plaintiffs seek statutory damages under the EFTA as well as relief under California Business &amp; Professions Code §§17200 <i>et seq.</i> (“UCL” or “Section 17200”) and Massachusetts General Law, Chapter 93A, §§2, 9, on behalf of themselves and several classes based on Bank of America’s purported failure to properly give notice on its ATM Decals of ATM fees for cash withdrawals.</p> | <p>1. Answer of Defendant, Bank of America, N.A., to Second Amended Complaint (“Answer”), Tenth Affirmative Defense.</p> <p>2. Complaint ¶¶15, 23, 33, 37, Prayer for Relief.</p> |
|---|---|

**III. PARTIAL SUMMARY JUDGMENT ON BANK OF AMERICA'S NINTH AFFIRMATIVE DEFENSE -- HAVE PLAINTIFFS SUFFERED INJURY OR DAMAGE?**

**Material Fact**

**Supporting Evidence**

- |   |  |
|---|--|
| <p>1. Bank of America asserts as its Ninth Affirmative Defense:</p> <p style="padding-left: 40px;">“Defendant denies that Plaintiffs and/or any member of the purported classes have suffered any injury or damage whatsoever, and further denies that it is liable to Plaintiffs and/or any member of the purported classes for any of the injury or damage claimed or for any injury or damage whatsoever.”</p> | <p>1. Answer, Ninth Affirmative Defense.</p> |
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**Material Fact**

**Supporting Evidence**

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|---|---|
| 2. The only harm alleged by Plaintiffs and the putative class members arising from Bank of America's purported EFTA violation is that they were each charged a fee for withdrawing cash from a Bank of America ATM.   | 2. Complaint ¶¶15, 21,24.               |
| 3. Since at least April 2004 and through the present, Bank of America has informed non-customers on the ATM screen that they are about to be charged a fee for a specified amount and requires the non-customer to consent to the fee before it is charged by clicking "yes." | 3. Declaration of Jennifer Haag ¶5.     |
| 4. If a non-customer enters "No" at the prompt on the ATM screen, the transaction is cancelled and no fee is charged.   | 4. <i>Id.</i>                           |
| 5. Bank of America posted the ATM Decal on the side of the ATM machine.   | 5. SAC §18.                             |
| 6. Plaintiffs used Bank of America's ATM machine to withdraw cash from their own bank and authorized Bank of America to debit their bank account in the amount of cash withdrawn plus the transaction fee.  | 6. Declaration of Jennifer Haag ¶¶5, 6. |

Dated: March 24, 2006

DEFENDANT

BANK OF AMERICA, N.A.

By its attorneys,

/s/ E. Macey Russell

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**CERTIFICATE OF SERVICE**

I, E. Macey Russell, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ E. Macey Russell

E. Macey Russell

# **Exhibit A**

IN UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

DOUGLAS S. BROWN, STEPHEN KAWELTI  
and JAMES A. PROSSER,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No. 05-10713-PBS

**DECLARATION OF JENNIFER HAAG**

I, Jennifer Haag, hereby depose and declare as follows:

1. I am a resident of the State of Missouri. I am over the age of 18 and believe in the obligations of an oath.
2. This Declaration is made in support of and is submitted in conjunction with defendants Bank of America's Motion for Partial Summary Judgment and Summary Judgment (as to Counts Two and Three), filed herewith.
3. I am Senior Vice President of E-Commerce Marketing and Product Manager of ATM Business Development at Bank of America. My responsibilities include product development, ATM transaction acquisition and migration, ATM marketing and advertising, and ATM user interface. In addition, I oversee the bank's relationships with other entities whose customers receive surcharge waivers from Bank of America. I have personal knowledge of the facts set forth in this Declaration.

**Bank of America's ATM Decal Notices**

4. Bank of America owns and operates thousands of ATMs with the States of California, Rhode Island, Maryland, and the Commonwealth of Massachusetts. To my

knowledge, Bank of America ATMs in Maryland and California have displayed a placard notice on or near the ATM machine that contains a message substantially similar to the following:

The owner of this terminal, Bank of America, may charge a \$1.50 fee for a cash withdrawal from your NON-Bank of America account. This charge is in addition to any fees that may be assessed by your financial institution. This additional charge will be added to your total withdrawal amount. For questions, please contact your financial institution.

Attached as Exhibit A to this Declaration is a true and correct copy of an exemplar of that ATM Decal notice.

#### **Bank of America's "Click-Through" Screens**

5. In addition to the ATM Decal notice, Bank of America informs consumers on the ATM screen that they are about to be charged a fee through an on-screen message, or "click-through" screen. If the ATM identifies the user as a non-customer of Bank of America, that prompts a special screen to appear, containing this notice:

Bank of America, the owner of this ATM machine, adds an ATM usage fee to cash withdrawals. This fee is in addition to any fee which may be assessed by your financial institution. Do you want to continue with this transaction? Yes / No

The "click through" screen also displays the amount of the fee, for example, \$1.50. Attached as Exhibit B to this Declaration is a true and correct copy of an exemplar of the on-screen display.

6. Only if the user enters "Yes" does the transaction continue and the fee is charged.

#### **Bank of America's "Fee Waiver" Categories**

7. Bank of America does not charge a cash withdrawal fee to every non-customer. The categories of non-customers for whom Bank of America does not charge a fee, since May 2004, include the following:

a) **Own Customers.** The Bank does not charge its own customers for cash withdrawals.

b) **Government benefits.** Bank of America does not charge a fee for cash withdrawals to some recipients of government benefits who use their "stored-value card" to withdraw cash at a Bank of America ATM.



c) **International.** In many states, Bank of America does not charge a fee for cash withdrawals made in the United States by cardholders who hold an ATM card issued by a foreign bank.

d) **Customers of Certain Other Institutions.** During the alleged class period, Bank of America has not charged cash withdrawal fees to customers of certain other financial institutions, including Bank of the Commonwealth, Valero Credit Union, Fleet Bank, Bristol County Savings Bank, Mechanics Savings Bank, Walpole, Hartford Credit Union and some co-branded cardholders of MBNA.

e) **Special Circumstances.** Bank of America also provides other fee waivers when special circumstances arise. For example, in the aftermath of Hurricane Katrina, Bank of America agreed not to charge for cash withdrawals made by cardholders using certain ATM cards issued by certain financial institutions located in Alabama, Louisiana, and Mississippi.

ON THIS 24 DAY OF MARCH 2006, I, JENNIFER HAAG, HEREBY DECLARE  
UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Jennifer Haag  
Jennifer Haag

# **Exhibit A**

4311 ANTHONY COURT  
SUITE 100  
ROCKLIN, CA 95677  
916 652-2900  
916 652-2901 FAX



Part Number: 95-32-2999B  
Product:  
Platform:

Deposit:  
Surcharge:  
States:

### **No ATM transaction fee with a Bank of America card!**

#### **Fee Notice to Other Cardholders**

Use your Bank of America ATM card, check card or credit card here without an ATM transaction fee to withdraw cash or to make transfers or balance inquiries. (Credit card cash advance fees may apply).

If you use another card, you may be charged a fee by us for these transactions. The amount of our fee will be disclosed on the terminal screen. Our fee is in addition to any fees that may be assessed by your financial institution.



95-32-2999B

Decal Size: 6.00" W. x 2.62" H.

August 30, 2005

# **Exhibit B**

(TransFee)

Bank of America  Higher Standards 

**Fee Notice**

**Fee Notice**

Bank of America, the owner of this ATM, adds an ATM usage fee to cash withdrawals. This fee is in addition to any fee which may be assessed by your financial institution.

Fee: \$1.50

Do you want to continue with this transaction?

**Yes** **No**